# Memo

Date: March 2, 2006

To: Patricia Ryan, Executive Director

From: John Gause, Commission Counsel

Re: [redacted]
H05-0560

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With respect to Complainants' Memorandum in Opposition to Administrative Dismissal, I will address Complainants' arguments in the order that they appear.

I.a. Complainants Argue that the Advertising Provisions Apply to Public Assistance.

Complainants first argue that the protections in the first full paragraph of 5 M.R.S.A. § 4582 (addressing discrimination on the basis of "race or color, sex, sexual orientation, physical or mental disability, religion, ancestry, national origin or familial status") apply to recipients of public assistance. They argue that, because members of the legislature believed that the original bill that added public assistance to the MHRA would prohibit advertising against families with children, by implication, the legislature also believed that the public assistance provisions would prohibit advertising against recipients of public assistance. Complainants then conclude that, because advertising was contemplated, the broad protections in the first paragraph should also apply to recipients of public assistance. This argument is not persuasive.

First, we cannot consider the legislative history when interpreting § 4582 because the plain meaning of the statute is clear. "It is proper for a court to go to the legislative history for guidance only when the legislative intent cannot be determined by the 'plain meaning' of the statutory language." *Pennings v. Pennings*, 2002 ME 3, ¶ 13 (Me. 2002). Here, § 4582 is clear on its face. The only provision covering recipients of public assistance is in a distinct paragraph (the fourth) that states that it is unlawful housing discrimination to "refuse to rent or impose different terms of tenancy" to any individual who is a recipient of public assistance. The absence of numerical listings or subsections, which Complainants allege is obfuscatory, does not obstruct the plain meaning of the statute. Each subcategory of prohibited discrimination is separated by semicolons, and, in the case of public assistance, by paragraphs.

Second, even if we were to consider the legislative history, the fact that some members of the legislature felt that the familial status provisions (which were deleted) would apply to advertising does not necessarily lead to the conclusion that members of the legislature also felt that the public assistance provision covered advertising. The legislative debate addressed advertising only in the context of familial status; it did not address it in the context of recipients of public assistance. The wording of the familial status provision is different from the wording in the public assistance

provision. The familial status provision stated that it was unlawful for any person to refuse to rent or "to restrict the rental of a residential unit to a number of related persons less than can comfortably and safely occupy such unit because of the status of such families or persons as having children or being a single parent family." L.D. No. 327. The public assistance provision, by contrast, made (and makes) it unlawful to "refuse to rent or impose different terms of tenancy. . ." to a recipient of public assistance. *See id.* Because the two phrases are different, it is difficult to infer that the legislature felt that they should be interpreted in the same fashion.

More instructive with respect to the legislative intent vis-à-vis the public assistance provision is the Statement of Fact that was annexed to the bill. *See Franklin Property Trust v. Foresite, Inc.*, 438 A.2d 218, 223 (Me. 1981) (Statements of Fact are "a proper and compelling aid to ascertaining the legislative purpose and intent"). The Statement of Fact provides that the problem of public assistance discrimination "manifests itself in the form of the refusal of landlords to rent to such families. . . . The purpose of this bill is to enable those citizens of Maine most in need of housing to have a fair and equal chance of obtaining it." L.D. No. 327. Thus, the Statement of Fact expressly contemplates only the refusal to rent and not the various other forms of housing discrimination, including advertising, identified in the first paragraph of § 4582.

In sum, the plain meaning of § 4582 makes it unlawful only "to refuse to rent or impose different terms of tenancy" to a recipient of public assistance. The other protections in the first paragraph (such as advertising, written or oral inquiries, etc.) do not apply to recipients of public assistance.

I.b. Complainants' Argument on Advertising.

Complainants next argue that they have stated a viable claim that Respondents advertised an intent to discriminate on the basis of public assistance. Because § 4582, by its plain terms, only prohibits refusals to rent or imposing other terms of tenancy, and does not prohibit discriminatory advertisements, Complainants' argument is unavailing. Moreover, even if § 4582 did prohibit advertising against recipients of public assistance, this does not change the standing analysis. There is no suggestion in the legislative record that the public assistance portion of the bill would be incorporated into the protections of the first paragraph of § 4582 (which would be an incredible position to take, given the fact that the legislature chose to add a separate paragraph covering public assistance rather than inserting it into the first paragraph). Thus, we are still confronted with the wording of the public assistance paragraph, which has a modifier that limits its scope to recipients of public assistance. This modifier, as I will discuss below, is what creates the standing requirement that Complainants be recipients of public assistance, whether we are talking about a refusal to rent or advertising.

II.a. FHA Standing Cases.

In this section, Complainants argue that sections of the Fair Housing Act, §§ 3604(d), 3604(b), have been interpreted to confer standing on testers who are not members of a protected class. These sections of the FHA are different, however, from the public assistance provision in the MHRA, as will be discussed below.

II.b. Federal Precedent as Guidance.

Complainants point out, correctly, that federal court interpretations of federal law when dealing with equivalent provisions of state law provide significant guidance. Conversely, however, when the provisions are not equivalent, the court interpretations are not controlling.

II.c. The MHRA and the FHA Definitions of Aggrieved Persons.

Complainants argue, incorrectly, that I was distinguishing in my original memo between the MHRA and the FHA as they define aggrieved persons. Both the MHRA and the FHA require that the person bringing a complaint believe that he or she was the subject of unlawful discrimination. Complainants have conflated my argument with respect to the different wording in the FHA and the MHRA defining unlawful discrimination, discussed below, with my pointing out that only persons who believe that they have been subjected to unlawful discrimination have standing under the MHRA (or the FHA, for that matter).

II.d. The Differences Between the FHA and the MHRA.

Complainants argue, incorrectly, that in light of the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), Complainants do not need to be recipients of public assistance to have standing under the MHRA. *Havens* held, in relevant part, that testers could establish a violation of the FHA, 42 U.S.C. § 3604(d) (prohibiting false representations on dwelling availability), regardless of whether they intended to rent or purchase the dwelling. *See id.* at 373. The FHA, § 3604(d), provides that is unlawful "[t]o represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." Emphasizing the use of the term "any person," the Court held that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing." *Id.*

This holding, however, does not apply to the public assistance provisions of § 4582. In finding that standing under § 3604(d) did not depend on whether plaintiffs intended to rent or purchase the dwelling, the Court relied on the fact that the statute did not require it. *See id.* The public assistance provision in the MHRA, however, expressly references the type of person who is covered. The section provides that it unlawful for "any person furnishing rental premises or public accommodations to refuse to rent or impose different terms of tenancy to <u>any individual who is a recipient</u> of federal, state or local public assistance, including medical assistance and housing subsidies primarily because of the individual's status as recipient." 5 M.R.S.A. § 4582 (emphasis added). Thus, by its plain terms, the MHRA requires an individual to actually receive public assistance in order to be covered.

Where the FHA has similar restrictions, it also has been interpreted to limit standing to those who meet its terms. For example, the FHA, 42 U.S.C. § 3604(f)(1), makes it unlawful to "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling <u>to any buyer or renter</u> because of a handicap. . . ." *Id.* (emphasis added). In *Ricks v. Beta Dev. Co.*, 1996 U.S. App. LEXIS 19743, *4 (9th Cir. 1996) (unpublished), the Ninth Circuit Court of Appeals held that this section only confers standing on those who allege that they are prospective buyers or renters. The

court distinguished §3604(f)(1), which includes "renter or buyer," from § 3604(d) (at issue in *Havens*), which applies to "any person." *See id.*

II.e. *Ricci v. Superintendent, Bureau of Banking.*

In this section, Complainants argue that the case cited in my original memorandum, *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d. 645 (Me. 1984), is inapplicable. The case is on point because it interprets a similar provision in the Administrative Procedures Act, namely, that "any person who is aggrieved by final agency action shall be entitled to judicial review." *Id.* (citing 5 M.R.S.A. 11001(1)) (emphasis added). Here, like the public assistance provisions of § 4582, which applies to "any individual who is a recipient of federal, state or local public assistance," there is a modifier attached to "any person," namely, a person "who is aggrieved." The Law Court held that a plaintiff only has standing to sue under the APA if he is aggrieved. *Id.* at 647. Similarly, a person only has standing to sue under the applicable provision in § 4582 if he is a recipient of public assistance.

III. Requirement of Showing that Testers Were "Otherwise Qualified."

Complainants argue in this section (responding to Barb's point) that they were not required to submit an application in order to have standing because doing so would have been a fruitless act. I have not researched this issue but would be happy to do so if you would like. Even if we assume that Complainants are right, however, they lack standing for the other reasons stated.

IV. Amendments to Add Neighborhood Standing

Finally, Complainants argue that, in light of their recent amendments to their charge of discrimination (only one Complainant, [redacted], submitted an amended charge attached to the Memorandum, and it has not yet been notarized), they have standing by virtue of the harms they suffered as members of the community affected by unlawful discrimination. It is important to note that this is not "tester standing." Rather, regardless of their acts as testers, Complainants allege that they suffered harm as a result of Respondents' refusal to rent to recipients of public assistance. In order to establish this claim, Complainants still must show a violation of someone else's interests, namely, that Respondents refused to rent or imposed different terms of tenancy on actual recipients of public assistance. Giving Complainants the benefit of inferences in their favor, the fact that Respondents told them that they do not rent to people who receive § 8 supports Complainants reasonable belief that Respondents have, in fact, denied housing to recipients of public assistance. This fact will need to be established during the investigation. In addition, in order to have standing, Complainants must show that they suffered harm as a result of the alleged unlawful discrimination. *Havens Realty Corp.*, 455 U.S. at 376. This is defined as "distinct and palpable injuries that are fairly traceable to [Respondents'] actions." *Id.* This may be difficult to do, given Complainants' remote proximity to the apartment complexes at issue. The Supreme Court has expressed skepticism about arguments of neighborhood standing based on an entire metropolitan area, *see Havens Realty Corp. v. Coleman*, 455 U.S. at 377, or where plaintiffs reside outside of the target neighborhood. *See Gladstone v. Village of Bellwood*, 441 U.S. 91, 113, n. 25 (1979). Giving Complainants the benefit of the doubt at this time, however, I would allow the claim to go forward, subject to their ability to make the necessary showing during the investigation.